2001

Richard S. Bennett, Wallace F. Bennett, Harold H. Bennet, The Bennett Association v. Arney K. Downard V. Claris E. Johnson, Velma, Johnson, Boyd J. Clark, Iris J. Clark : Brief of Appellant

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

STATE OF UTAH

RICHARD S. BENNETT, WALLACE F. BENNETT, and HAROLD H. BENNETT, Trustees, dba THE BENNETT ASSOCIATION,
Plaintiffs and Respondents,

vs.

ARNEL K. DOWNARD,
Defendant and Respondent,

vs.

CLARIS E. JOHNSON and VELMA JOHNSON and BOYD J. CLARK and IRIS J. CLARK,
Defendants and Appellants.

Case No. 13740

APPELLANTS' BRIEF

THIS IS AN APPEAL OF THE APPELLANTS CLARIS E. JOHNSON and VELMA JOHNSON and BOYD J. CLARK and IRIS J. CLARK FROM JUDGMENT OF THE SECOND DISTRICT COURT, WEBER COUNTY, HONORABLE JOHN F. WAHLQUIST, JUDGE.

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IN THE

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NATURE OF CASE

Appellants were co-defendants with Arnel K. Downard in an action brought by plaintiff, Bennett's Association for judgment against defendants, Downard, for materials furnished Downard as a general contractor and against defendants, Johnson and Clark, as the owner of the property the materials were used on under 14-2-1

and 14-2-2, U. C. A. 1953, defendant, Downard cross-claimed for any judgment granted against him in favor of Bennett's Association and for the balance due on his contract with Taco Siesta International.

DISPOSITION IN LOWER COURT

The matter was submitted to the jury on two special interrogatories as follows:

> 1) Do you find it proven by a preponderance of the evidence that Bennett's made demand upon defendant Johnson to exhibit the contruction bond in question before the action was filed and that he did not reasonably comply?
>
> Answer: Yes.
>
> 2) Do you find it proven by a preponderance of the evidence that defendant, Johnson, was a party to the contract marked, "Defendant's Exhibit 1?"
>
> Answer: Yes.

As a result of the foregoing answers to special interrogatories ,the court entered judgment against appellants as follows:

1. Plaintiffs have judgment against defendants Claris E. Johnson, Velma Johnson, Boyd J. Clark and Iris J. Clark, and that said defendants be jointly and severally liable with defendant Downard on said judgment in the sum of $1,652.00 with interest in the sum of $497.00, and court costs in the sum of $72.00, for a total judgment in the sum of $2,221.00.

2. That defendant Downard have judgment over against defendants Claris E. Johnson, Velma Johnson, Boyd J. Clark and Iris J. Clark in the sum of $2,221.00 representing the amount of the judgment that has been rendered against defendant Downard, or any amount defendant Downard is forced to pay as a result of the judgment heretofore entered and further defendant Downard is entitled to judgment against defendants Claris E. Johnson, Velma Johnson, Boyd J. Clark, and Iris J. Clark in the sum of $1,028.19 together with interest in the sum of $308.40, and court costs in the sum of $17.50, for a total judgment in the sum of $1,354.09.

RELIEF SOUGHT ON APPEAL

Defendants Johnson and Clark seek a reversal of the verdict and judgment against them.

STATEMENT OF FACTS

The record on appeal consists of two volumes, one of which consists of the pleadings, minute entries and similar papers. All references to this volume are designated by the letter "R." The other volume consists of the transcript of the testimony and proceedings held May 1, 1974. All references to this volume are designated by the letter, "T."

Defendants, Johnson and Clark, were the owners of real property located in South Ogden, Weber County, Utah. They were contacted by a California corporation known as Taco Siesta International about Taco Siesta

constructing a restaurant facility on their property. As a result, a contract was drawn up between Johnson and Clark and Taco Siesta (Defendant's Exhibit 2) wherein Johnson and Clark leased the real property to Taco Siesta; that Taco Siesta would construct a facility on the premises; that Johnsons and Clarks, as lessors, would furnish Thirty-Two Thousand Dollars ($32,000.00) toward the construction costs. The contract further provided that the lessee (Taco Siesta) would engage in a contract with a suitable contractor duly bonded for the construction of the project. As part of the lease agreement that Johson and Clark had with Taco Siesta (Defendant's Exhibit 2), the funds borrowed by Johnson and Clark were to be disbursed by a proper officer of the bank and any unused funds to remain to credit of lessor (Johnsons and Clarks). Taco Siesta was to also pay Five Thousand Dollars ($5,000.00) as pre-payment of rental; said sum to be applied towards monthly rental at the rate of $50.00 per month; with rent at $650.00 per month to commence five (5) days after: a) filing of notice of completion; b) date premises opened to public or c) not longer than 90 days after construction funds available. The Five Thousand Dollars ($5,000.00) check of Taco Siesta was not paid when initially presented for payment (Defendant's Exhibit 5) but was later honored and Taco Siesta failed to make the rental payments as agreed (T. 54, 55).

As a result of the contract between Johnsons and Clarks and Taco Siesta, Taco Siesta entered into a construction contract with defendant, Arnel K. Downard

(Defendant's Exhibit 1); the architect for Taco Siesta, Joe Lewis Wilkins, signed the contract in the place designated as "Owner," with his signature in long hand and underneath printed, "Taco Siesta for Clair Johnson." Clair Johnson did not enter into the contract with Downard, nor did he authorize Joe Lewis Wilkins to append "for Clair Johnson (T. 52) and defendant Downard never claims that Johnson did (T. 71), but to the contrary, Downard knew he had contracted with Taco Siesta, not Johnson (T. 71, 72, 73). Downard did obtain a construction bond from United States Fidelity and Guarantee Company in the contract amount of Thirty One Thousand, Eight Hundred and Sixty Dollars ($31,860.00) (Plaintiff's Exhibit B).

Because of the apparent financial instability of Taco Siesta, in presenting the check that bounced and failing to pay the rent as agreed, Johnson instead of paying Taco Siesta the construction funds, paid them directly to Downard and the sub-contractors and materialmen by joint checks until he had paid Thirty-Two Thousand Dollars ($32,000.00) less the unpaid rentals due him from Taco Siesta considering that the unpaid rental should be an offset against the Thirty-Two Thousand Dollars ($32,000.00) (T. 54, 55). This manner of payment was with the consent of Taco Siesta representative (T. 41, 44). Plaintiff, Bennett Association, became apprehensive about not receiving payment from Downard. Mr. Richard Winters, credit manager for Bennetts contacted Mr. Johnson and in the conversation learned that

there was a contractor bond written by the United States Fidelity and Guarantee Company through Eastman Hatch Agency of Salt Lake City (T. 25). Mr. Winters was given the name of the agent and the serial number of the bond (T. 25) and as a result, contacted a Mr. Squires at the Eastman Hatch Agency and was told that the bond did exist; that it did not accrue to the protection of the materialmen (T. 26, 85). Mr. Winters claims to have made a request for a copy of the bond or to exhibit it on request (T. 82). Mr. Winters admitted that he, upon contacting the agent for the bonding company, was as knowledgable about the content of the bond as if it had been personally exhibited to him (T. 89, 90). The court ruled that the bond (Plaintiff's Exhibit B) was sufficient and adequately protected Bennett's Association (T. 91, 92).

At the conclusion of plaintiffs' and defendants' evidence, Johnson and Clark moved for dismissal of Bennett's complaint and Downard's cross-complaint (T. 96). These motions were denied.

ARGUMENT

POINT I.

THE COURT ERRED IN NOT GRANTING DEFENDANTS' JOHNSON'S AND CLARK'S MOTION TO DISMISS BENNETT'S COMPLAINT.

Plaintiff, Bennett's Association, claim against John-

son and Clark is based on 14-2-1, U. C. A., 1953, which provides insofar as pertinent herein:

> "*The owner of any interest in land* (emphasis ours) entering into a contract involving $500.00 or more for the construction, addition to or alteration or repair of any building, or structure or improvement upon land, shall before any such work is commenced obtain from the contractor a bond * * * conditioned for the prompt payment for material furnished and labor performed under the contract * * *. The bond provided for herein shall be exhibited to any person interested upon request."

and 14-2-2, U. C. A., 1953, which provides insofar as pertinent hereto:

> "Any person subject to the provision of this chapter who shall fail to obtain such good and sufficient bond or to exhibit the same as herein required, shall be personally liable to all persons who have furnished material or performed labor under the contract * * *.

The facts have shown that it was not the *owner* (emphasis ours) who entered into the contract with Bennetts but Downard who was contractor for Taco Siesta. And that there was no contract existing between Johnson and Clark and Downard. It is granted that in the absence of a bond or proper exhibition of the same, Taco Siesta would be liable on their leasehold interest for the price agreed upon (*King's Brother's, Inc.* vs. *Utah Dry Kiln Company*, 440 Pacific 2nd 17), but the statute

if it means what it says provides that *the owner of the interest* (emphasis ours) in land cannot be held personally responsible *unless said owner has entered into the contract* (emphasis ours) for the improvements. There is no provision in law or equity for an owner to be personally liable for obligations incurred by the lessee without the owner's authorization (*King Brother's, Inc.* vs. *Utah Dry Kiln Company*, 440 Pacific 2nd 17). There is a correlation between the statutes above cited and the mechanic's lien law of our state. 38-1-3, U. C. A., 1953, provides that the authorization for the material furnished or labor performed upon which the lien is based must be at "the instance of the owner of any other person acting by his authorization as agent, contractor or otherwise." The owner in the instant case did not contract with the contractor for the construction of improvements upon his land nor did he authorize the contractor to obtain materials and labor from Bennett's on his behalf. The question to be answered therefore, is whether the lessee through his contract can make the owner liable under 14-2-1 and 14-2-2, U. C. A., 1953. The answer based upon the reasoning of *King Brother's, Inc.* vs. *Utah Dry Kiln Company*, previously cited seems to be in the negative.

In the event that the court was to conclude that the lessee, without authorization, can make the owner liable for improvements constructed at the request of lessee or his agent (contractor). We must then look to whether a bond was provided, whether the bond was sufficient

and whether it was exhibited to any person interested upon request.

A bond was provided (Plaintiff's Exhibit B). It was sufficient to protect Bennett's Association (T. 91, 92), *Deluxe Glass Company* vs. *Martin*, 208 Pacific 2nd 1127 (Utah). The testimony shows that there was a casual conversation between Bennett's man Winters and Johnson around October 29, 1969, wherein Winters *seems* to recall the request but at any event, both parties recall that Bennett's were given the name of the bonding company, the name of the agent in Salt Lake City and pursuant thereto Bennett's man Winters contacted the agent and learned of the existence of the bond and according to his own admission, knew as much of the contents of the bond as if it had been personally exhibited to him (T. 89, 90). What more would have Bennett's learned if they had had the bond in their hands. We submit that if there was a substantial exhibition of the bond to Bennett's sufficient for them to protect their interest, the statute was complied with. After the suit was filed by Bennett's, a copy of the bond was furnished to them (R. 4, 7).

POINT II.

THE COURT ERRED IN FAILING TO GRANT DEFENDANTS' JOHNSON'S AND CLARK'S MOTION TO DISMISS DEFENDANT DOWNARD'S CROSS-CLAIM AGAINST JOHNSON AND CLARK.

The evidence is uncontroverted that Johnson and Clark contracted only with Taco Siesta. In their lease (Defendant's Exhibit 2) there was a specific provision that the lessee (Taco Siesta) would contract with the contractor. None of the defendants, Johnson or Clark, signed the agreement between Taco Siesta and Downard (Defendant's Exhibit 1), nor was there any evidence that the architect, Joe Lewis Wilkins, was acting as the agent for these defendants. Johnson became involved with Downard only because of the apparent financial instability of Taco Siesta and Johnson paid the money to Downard and the sub-contractors so that they would get their money and Johnson would not be stuck with liens. Johnson paid Downard only with the consent of Taco Siesta's architect and upon the submission of an account (T. 44, 46) (Defendant's Exhibit 6).

It is unbelievable that anyone could consider that because Johnson paid Downard the moneys instead of Taco Siesta that this created a contract with Johnson, and Downard is not entitled from Johnson and Clark the balance of the money due him from Taco Siesta.

Downard was also awarded a judgment against Johnson and Clark for the sum of Twenty-Two Hundred Dollars and Twenty-One Cents ($2,200.21) representing the amount of the judgment that has been rendered against defendant Downard or any amount defendant Downard is forced to pay as result of the judgment heretofore entered against Downard by Bennett's.

There is simply no legal theory whereby the con-

trator who failed to pay materialmen is entitled to a judgment against a party with whom he has no privity, with whom he has not contracted and who has not agreed in law or equity, expressly or by implication, to reimburse him.

Because there was no express contract between Downard and Johnsons and Clarks, if a contract existed, it would have to be based upon implication. This is not the case here because of the knowledge of Downard that he contracted only with Taco Siesta.

> "An implied contract between two parties is only raised when the facts are such that an intent may fairly be inferred on their part to make such a contract." American Jurisprudence, Vol. 12, page 500, Sec. 5.

In *McCaffrey* vs. *Cronin*, 295 Pacific 2nd 587 (Cal.):

> "It is said that an implied contract is one not expressed by the parties, but gathered from the facts showing *a mutual intent to contract.*" (Emphasis ours.)

From Corpus Juris Secundum, Volume 17, Section 4, page 557, it is stated:

> "A contract "implied in fact" * * * or an implied contract in the proper sense arises where the intention of the parties is not expressed but an agreement in fact creating an obligation is implied or presumed from their acts or as it has been otherwise stated where there are circum-

> stances which according to the ordinary course of dealing and the common understanding of men show a mutual intent to contract. It has been said that a contract implied in fact must contain all of the elements of an expressed contract. So such a contract is dependent on mutual agreement or consent and on the intention of the parties and a meeting of the minds is required."
>
> See also Restatement of Contracts Section 5:
>
> *Gleason* vs. *Salt Lake City*, 74 Pacific 2nd 1225; *Kimball Elevator Company* vs. *Elevator Supplies Co.*, 272 P. 2 583, 2 Ut. 2d 289.

There can be no other conclusion derived from the facts than 1) Johnson intended to contract only with Taco Siesta; 2) Downard intended to contract only with Taco Siesta. Therefore, there is no contract express or implied between the parties and no basis for the verdict of the jury and the judgment of the court. (*Baugh* vs. *Darley*, 184 Pac. 2 335, 112 Ut. 1.)

POINT III.

COURT ERRED IN GIVING INSTRUCTION NUMBER 2.

The Court erred in giving instruction number 2 and particularly interrogatory number 2 in the instructions and the explanation thereunder for the reason that there is no evidence whatsoever that the defendant, Johnson, was a party to the contract marked Defendant's Ex-

hibt 1. Defendant, Downard, admits that he contracted with Taco Siesta. No where on the contract does the signature of defendant, Johnson appear and the record is completely devoid of any evidence that the statement "for Clair Johnson" was printed on the contract by any authority or consent of defendant, Johnson. The evidence is all to the fact that defendant, Downard, knew that he had contracted with Taco Siesta.

The Court further erred in giving the explanation to interrogatory number 2 in that there is no evidence that the defendants, Johnson and Clarks, knew that the contract had been executed and that Joe Lewis Wilkins, the architect for Taco Siesta, had noted that he signed as owner for Claire Johnson and that Johnsons and Clarks knew that an innocent person was relying thereon. In this respect, Downard was certainly not an innocent person because he knew that the only contract that he had executed was with Taco Siesta. Further, how can it be seriously claimed that Johnson and Clarks "deliberately lay back and secretly let others complete the project believing that he was a party to the contract." Johnson and Clarks as has been stated, at all times took the position that the contract was between Downard and Taco Siesta; that Johnson paid Downard with the consent of the architect of Taco Siesta and only to protect Downard and his sub-contractor and to make certain that when the facility was completed that there were no liens upon the premises.

POINT IV.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICT OF THE JURY.

This matter was submitted to the jury upon two special interrogatories found in instruction number 2. Interrogatory number 1 is as follows:

> "Do you find it proven by a preponderance of the evidence that Bennett's made demand upon defendant, Johnson, to exhibit the construction bond in question before the action was filed and that he did not reasonably comply."

Interrogatory number 2:

> "Do you find it proven by a preponderance of the evidence that defendant, Johnson, was a party to the contract marked Defendant's Exhibit Number 1."

In the court's explanation following interrogatory number 1, it stated, "If Bennett's made a demand to see the bond and they were reasonably provided with a satisfactory method to secure the necessary information so that such information was reasonably made available to them, then there would be no material breach by Johnson."

As stated before, on or before October 29, 1969, Bennett's man, Winter, was informed of the existence of the bond, the name of the bonding company and that the bonding company's agent was Eastman Hatch Company

in Salt Lake City, Utah and that thereafter, he contacted the bonding agent and was informed of the existence of the bond, but was mislead by the bonding company's agent in believing that the bond did not cover Bennett's claim which was untrue, as was found by the court. At this point, Bennett's had all of the information they would have had had they examined the bond personally and had the knowledge in time to have filed a claim under the bond before the statute of limitations ran out against it and therefore, there was no material breach by Johnson and the jury failed to follow the court's instruction and had it done so, would have found in favor of Johnson on this issue.

In regard to interrogatory number 2, the evidence is insufficient to sustain the jury's answer to interrogatory number 2 for reasons stated before and so as not to be repetitious, they are briefly, that Johnsons and Clarks never entered into a contract with Downard, did not authorize anyone else to enter into a contract for them with Downard, did not at any time intend to enter into a contract with Downard and the evidence is that Downard knew that he was contracting with Taco Siesta and not with Johnson.

POINT V.

THE COURT ERRED IN INFORMING THE JURY THAT IF MR. JOHNSON SUSTAINED ANY LOSS THAT THE BONDING COMPANY WOULD PAY FOR SUCH LOSS.

If any explanation can be made for the jury, answering the interrogatories numbers 1 and 2, as they did, it may be very well found in the comments of the court as found on page 91 and 92 of the transcript, wherein the court informs the jury as to its determination that the bond is sufficient, makes an explanation of bonds in general and states as follows, "The bonding company insofar as the court is aware, is still valid, solvent and will stand any loss Mr. Johnson takes in this matter. That is true, if Mr. Johnson suffers a loss merely because he is a landowner."

This statement was objected to by counsel, but to no avail, and the court did not attempt to rectify the situation.

To a jury that perhaps could not remember the assertions or denials of the parties; to fail to understand, "Preponderance of evidence" or to remember all of the evidence, this gave them the easy out because then no one would be hurt because Downard could be given a judgment against Johnson, Johnson could make a claim against the bonding company which would not occasion him a loss and the bonding company was not in court.

CONCLUSION

There was insufficient evidence to warrant a submission of the case to the jury. Defendant Johnson's and Clark's motion should have been granted. There was insufficient evidence upon which the jury could answer

the interrogatories as they did and therefore, the judgment against Johnsons and Clarks in favor of Bennett's and Downard should be reversed.

Respectfully submitted,

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